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STATE BAR COURT
CLERKS OFFICE
LOS ANGELES

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THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)
ROBERT VICTOR MASENGA,)
Member No. 62020,)
A Member of the State Bar.)

Case No. 04-V-15273-RMT
DECISION

INTRODUCTION

The issue herein is whether petitioner ROBERT VICTOR MASENGA has demonstrated, to the satisfaction of this court, his rehabilitation, present fitness to practice law, and present learning and ability in the general law, so that he may be relived from his actual suspension to practice law. (Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct ["standard 1.4(c)(ii)"].)¹

For the reasons set forth below, the court finds that petitioner has shown, by a preponderance of the evidence, that he has satisfied the requirements of standard 1.4(c)(ii). The court therefore grants the petition to be relieved from his actual suspension from the practice of law.

SIGNIFICANT PROCEDURAL HISTORY

On November 12, 2004, petitioner filed a verified petition seeking relief from actual suspension. He was represented by counsel, Erica Tabachnick. The Office of the Chief Trial

¹The standards are found in Title IV of the Rules of Procedure of the State Bar of California. All further references to standards are to this source.

1 Counsel ("OCTC"), by Charles A. Murray and Brooke A. Schafer, filed its response to the
2 petition on December 21, 2004, indicating that it did not oppose terminating the actual
3 suspension because of the information contained in the petition and supporting documents and
4 because petitioner is participating in the court's Program for Respondents with Substance Abuse
5 of Mental Health Issues ("Program") and in the Lawyer Assistance Program ("LAP").

6 The matter was submitted for decision without hearing on January 21, 2005.

7 JURISDICTION

8 Petitioner was licensed to practice law in the State of California on December 20, 1974,
9 and at all times mentioned herein has been a member of the State Bar of California.

10 FINDINGS OF FACT

11 Underlying Disciplinary Proceedings

12 On June 12, 2002, the Supreme Court issued an order in Supreme Court matter S105641
13 (State Bar Court Case No. 00-O-11468) suspending petitioner from the practice of law for three
14 years, staying execution of said suspension, and actually suspending him from the practice of
15 law for 18 months and until he complied with rule 205, Rules Proc. of State Bar ("rule"). If he
16 remained actually suspended for more than two years, he was ordered to comply with standard
17 1.4(c)(ii). Petitioner was also ordered to comply with rule 955(a) and ©), Cal. Rules of Court
18 ("CRC 955"), among other things.

19 Nature of Underlying Misconduct

20 In Supreme Court matter S105641, discipline was imposed due to trust account violations
21 and for two instances of not cooperating with the State Bar occurring between about February
22 1999 through May 2001. The trust account violations including commingling personal and trust
23 funds; repeated dips in the trust account balance; issuing checks against insufficient funds; and
24 misappropriating about \$129,509.46. The court specifically found in this default matter that
25 there was no actual financial loss to the bank or to clients. Multiple acts of misconduct was the
26 only aggravating factor. In mitigation, the court found 24 years of discipline-free practice prior
27 to the commencement of the misconduct.

28 On August 5, 2002, a Notice of Disciplinary Charges ("NDC") was filed against

1 petitioner in case no. 01-O-04049 alleging that he practiced law while suspended for
2 noncompliance with MCLE requirements during September and October 2001. The NDC also
3 averred that Petitioner did not cooperate with the State Bar in the investigation of that matter.

4 On September 19, 2002, an NDC was filed against petitioner in case no. 02--14104
5 alleging that he did not comply with the requirements of CRC 955©) by August 21, 2002.
6 Petitioner belatedly filed his CRC 955©) affidavit on November 1, 2002, in which he indicated
7 that he did not represent any clients as of June 12, 2002.

8 On December 20, 2002, an NDC was filed against petitioner in case no. 02-O-10439
9 alleging one count of practicing law while suspended in September and November 2001 and one
10 count of not cooperating with the State Bar's investigation of the matter.²

11 On December 8, 2004, the court granted petitioner's motion complying with rule 205 and
12 placed him on probation with conditions for three years.

13 Petitioner was accepted into the court's Program and into the Lawyer Assistance Program
14 due to mental health issues. On February 26, 2004, the court approved the parties' stipulation
15 regarding his participation in the Program.

16 **Petitioner's Rehabilitation and Present Fitness to Practice Law**

17 **Rehabilitation**

18 Petitioner began suffering from mental health issues in early 1999 and continuing
19 through the time periods encompassed by the NDCs described above. These issues interfered
20 with his ability to address problems and with his judgment and decision-making capabilities.

21 Prior to these difficulties, petitioner had a good reputation in the legal community and
22 was respected by judges and attorneys. The mental health issues appeared abruptly and created a
23 marked change in his long-established history of high professional standards.

24 Petitioner acknowledged his problems and voluntarily has undergone treatment. In May
25 2002, he commenced treatment with Darlene Lancer, M.A., M.F.C.C., on a weekly basis to
26

27
28 ²An NDC superceding this one was filed on December 27, 2002, as the December 20 NDC
contained clerical errors.

1 address his emotional and family problems. According to Lancer, petitioner participated
2 seriously in his treatment and adopted tools, coping mechanisms and a support system to assist
3 him in addressing his difficulties. He was remorseful and strongly motivated toward self-
4 examination and change and exhibited significant progress. As of July 2002, Lancer believed
5 that it would be beneficial for petitioner to return to the practice of law and that he did not pose a
6 risk to clients or to the public. Petitioner stopped treatment with Lancer in November 2002
7 because his health insurance did not cover it.

8 In December 2002, petitioner commenced treatment with Dr. Stephen Friedman which
9 was covered by health insurance. Petitioner felt he would be better served by treating with a
10 psychiatrist, Dr. Richard Sandor, and commenced treatment with him in November 2003. Dr.
11 Sandor is certified in alcoholism and other drug dependencies by the American Society of
12 Addiction Medicine. He also has a certificate of added qualification in addiction psychiatry
13 from the American Board of Psychiatry and Neurology.

14 According to Dr. Sandor, the diagnosis of petitioner's mental health problems is
15 problematic because they do not all neatly into the standard diagnostic categories. Petitioner was
16 depressed when he began using money from his client trust account; however, his symptoms did
17 not rise to the level of impairment to warrant the diagnosis of either major depression (DSM IV
18 296.2x) or dysthymia (300.4). There is no question in Dr. Sandor's mind, however, that
19 petitioner was in a seriously unhappy mood although he did not have the other symptoms
20 required for these diagnoses (such as sleep or appetite disturbance, difficulty concentrating,
21 fatigue, psychomotor alternations).

22 In about 1999, petitioner was experiencing a chronic sense of inadequacy and, therefore,
23 unhappiness, about not having the cash flow from his practice to provide his family with the
24 kinds of things that he believed they had come to expect from him. For example, rather than
25 taking an affordable vacation at a local ski resort, he "borrowed" money from a trust account to
26 take his family to a more upscale resort in Utah. While he knew that this was legally wrong, it
27 did not seem to him then to be morally wrong. He believed that he would be able to (and did)
28 refund the money to the account and so he did not feel the constraint of conscience. He was

1 unaware of the effect these actions were having on his character. His wrong-doing was
2 discovered and then the consequent character problem contributed to his making the situation
3 worse. He ignored his responsibilities to the State Bar.

4 According to Dr. Sandor, there are two important factors which help to understand why
5 an otherwise intelligent person with no other history of moral misconduct would sabotage
6 himself with such self-destructive behavior.

7 Petitioner's deception, which he now recognizes as his "alcohol," became habitual. It
8 worked, no one seemed to be harmed and there were no apparent consequences. Gradually, as
9 his feelings of discomfort died away, he became less and less aware that what he was doing was
10 wrong. As his feelings of "wrongness" failed to affect his actions, he became less able to act in
11 accordance with conscience. Eventually, he became less and less aware of his feelings. Dr.
12 Sandor believes that, to some degree, this habit of "not feeling" persisted well after he began
13 experiencing the consequences of his actions. Dr. Sandor opines that these factors help to
14 understand petitioner's disregard of his obligations to the State Bar and to those who were
15 otherwise disposed to support him.

16 Petitioner believes that he has now been able to deal with his avoidance and denial and
17 that he is competent to resume the practice of law. According to Dr. Sandor, a petitioner
18 understands his problem and is dealing adequately with it. He has been participating actively in
19 the LAP and in the Twelve Step group, Debtors Anonymous. Dr. Sandor believes that petitioner
20 has made excellent progress. He has experienced a reawakening his conscience and his ability to
21 act in accordance with it which is a significant change. One of the very encouraging aspects of
22 this change is petitioner's increasing ability to see the similarities between himself and the other
23 participants in these groups instead of the differences. Petitioner fully accepts responsibility for
24 his actions, sees how he could slip into repeating them if he ceases to be vigilant. In Dr. Sandor's
25 opinion, petitioner is committed to remaining vigilant and has a genuine desire to stay connected
26 to the people in the support programs in which he is participating. He is grateful to those who
27 have made his rehabilitation possible. Dr. Sandor sees no evidence of any diagnosable
28 psychopathology other than the psychodynamics described above. He believes that with

1 continued participation in the LAP and in Debtors Anonymous, petitioner has a good prognosis
2 for not repeating the mistakes of his past.

3 Petitioner has been active in church activities as more fully discussed below.

4 **Character Witnesses**

5 Petitioner's character witnesses, who were familiar with the nature and extent of his
6 misconduct, consistently attested to his honesty, candor and trustworthiness. They note that his
7 misconduct was aberrational and, since he is obtaining psychological treatment, will not reoccur.

8
9 **Eric Yamamoto**

10 Eric R. Yamamoto has been admitted to the practice of law in California since June 1975
11 and is a sole practitioner working in probate-related matters. He and petitioner met as first-year
12 students at Loyola Law School in October 1971. They have maintained both a social and
13 business relationship since then. Since then, they have spoken regularly and, since early in 2003,
14 they speak a couple of times a week. At least one of those weekly conversations is in person.

15 Yamamoto has been advised about the pending and prior disciplinary proceedings
16 regarding petitioner. He has reviewed the NDC regarding the unauthorized practice of law.

17 Petitioner has been working at Yamamoto's office at least once a week as a paralegal
18 since late April 2002. He also drafts pleadings and correspondence at home and brings them in
19 to the office for review.

20 According to Yamamoto, petitioner is always conscientious and does an excellent job.
21 For example, he will anticipate pleadings that need to be prepared in different probate matters.

22 Yamamoto believes that petitioner is of the highest moral character and that his
23 misconduct is aberrational. He has always been honest and direct with Yamamoto and has been
24 responsive to his clients. Whenever he has promised something, he has always come through.
25 His integrity is unquestionable. Yamamoto's professional friends were shocked to learn about
26 petitioner's suspension. They talked about what a great guy he was and how good his work
27 product was.

28 **William R. Sweeney**

1 William R. Sweeney has been a California attorney since 1953. He was a partner in a
2 multifaceted law firm in which his primary area of practice was labor law, legislative
3 representation and associated litigation. He is now employed by the Sweeney Law Corporation
4 which represents Nuevo Developers, Inc. In securing entitlements for and develops real property.
5 Representation of this company and of the Oxnard Foundation, a charitable institution, are now
6 his primary areas of practice.

7 Sweeney and petitioner met in 1981 when Sweeney referred to petitioner a client for
8 estate planning. They developed both a social and business relationship. Sweeney referred
9 numerous clients to petitioner for estate planning and his representation of those clients was
10 always of the highest quality.

11 Sweeney and petitioner speak quite frequently because, a number of years ago, Sweeney
12 asked petitioner to serve as trustee of a trust that he established for his children. The real
13 property that is in the trust is in the process of being sold for an amount in excess of \$8 million.
14 They speak in person or on the telephone about this matter regularly.

15 Sweeney has read the State Bar Court's decision regarding alternate recommendations
16 for degree of discipline in petitioner's case. Petitioner had previously advised him of the State
17 Bar proceedings brought against him.

18 Petitioner told Sweeney that he was seeing a therapist for his emotional problems and
19 that he has found it to be very helpful.

20 Sweeney believes that petitioner's integrity is of the highest quality. He believes that the
21 conduct that gave rise to the State Bar proceedings is out of character. He does not believe that
22 petitioner will engage in misconduct again. One of the reasons for this belief is the therapy that
23 petitioner has been engaged in.

24 **Lynard C. Hinojosa**

25 Lynard C. Hinojosa has been a California attorney since 1968. He primarily practices in
26 probate-related matters.

27 Hinojosa and petitioner met about 20 years ago. They enjoy both a social and a business
28 relationship. They have had innumerable conversations over the course of the years and

1 approximately 40 of those conversations per year involve face-to-face meetings, usually at the
2 courthouse. Their conversations are usually related to business or court matters and general
3 personal matters. Hinojosa has observed petitioner in court with his clients or other attorneys.

4 Petitioner has advised Hinojosa about the disciplinary proceedings pending against him
5 as well as his prior discipline. He has read the NDC addressing the unauthorized practice of law.

6 Hinojosa believes that petitioner has always been conscientious and reliable. He is of the
7 highest moral character and his misconduct, both previous and present, is aberrational. Hinojosa
8 was astonished at petitioner's original misconduct and even more so at his failure to cooperate
9 with the State Bar or even defend himself. Hinojosa can only attribute the misconduct to a
10 profound emotional and psychological break or depression.

11 Petitioner has always been honest and direct with Hinojosa and responsive to his clients.
12 Whenever he has promised something, he has always performed and kept his word. His integrity
13 is unquestionable. They had many probate cases in which they each represented interested
14 parties and petitioner has never attempted to assert an improper or unjustified claim. He has
15 always been open and honest in his dealings with him.

16 **Rev. Thomas D. Kelley**

17 Father Thomas D. Kelley is a Catholic priest and a chaplain in the United States Air
18 Force. He is presently in the Air Force Reserve and also assists the priests at American Martyrs
19 Church in Manhattan Beach which is petitioner's parish.

20 Kelley and petitioner met in September 1963 when they started high school at St.
21 Bernard's in Playa del Rey. After they both went away to college, they would see each other
22 infrequently until 1980 when petitioner moved to Manhattan Beach. Kelley's mother resides
23 there so he would see petitioner frequently when Kelley visited his mother. In December 2000,
24 Kelley moved to Manhattan Beach to live with his mother and, since then, petitioner and Kelley
25 speak weekly, mostly in person.

26 Kelley has read the State Bar Court's decision regarding alternate recommendations for
27 degree of discipline in petitioner's case. They have also had extensive, candid discussions about
28 his problems with the State Bar.

1 Petitioner told Kelley that he has sought therapy for his emotional problems and that he
2 found the therapy to be very helpful. This is one of the reasons why Kelley believes that
3 petitioner will not engage in future misconduct.

4 Kelley believes that petitioner's moral character is impeccable. Based on their lengthy
5 discussions, Kelley believes that his problems with the State Bar were a result of his emotional
6 problems. Petitioner has always been forthright in discussing his problems with Kelley. Kelley
7 does not believe that petitioner will engage in misconduct again.

8 **Kevin J. McCormick**

9 Kevin J. McCormick is a business owner and along-time client and friend of petitioner's.
10 They met in 1990 when they both had children attending American Martyrs School in Manhattan
11 Beach. Petitioner completed an estate plan for McCormick's father and then became the
12 attorney for their family-owned businesses, McCormick Mortuaries and McCormick Ambulance
13 Company. Petitioner represented these companies as well as many individual family members
14 until his suspension in 2001. His representation was always of the highest quality. He assisted
15 both the family and the businesses through some difficult and protracted litigation. After his
16 suspension, petitioner referred them to other attorneys to assist in ongoing legal matters
17 regarding the businesses and McCormick's father's estate. Petitioner assisted those attorneys in
18 every way that he could in representing the McCormick interests.

19 McCormick and petitioner are also friends. They see each other socially. They have
20 worked together at the parish school and in coaching youth sports teams. Petitioner has always
21 been very involved in community activities.

22 McCormick has read the State Bar Court's decision regarding alternate recommendations
23 for degree of discipline in petitioner's case. They have also had several very open discussions
24 about his problems with the State Bar.

25 McCormick's experience, on both a personal and business levels, is that petitioner is a
26 man of good character. He trusts petitioner's judgment and always found his counsel and advice
27 to be extremely helpful and professional. McCormick believes that petitioner's State Bar
28 problems were the result of his emotional problems for which he has sought therapy. Petitioner

1 found the therapy to be extremely beneficial. This is one of the reasons why McCormick
2 believes that petitioner will not engage in future misconduct.

3 **Sr. Jill M. Napier, CSJ**

4 Sister Jill M. Napier is a member of the Sisters of St. Joseph of Carondelet, a canonical
5 religious community of the Roman Catholic Church. She is presently the Treasurer of the Sisters
6 of St. Joseph for the Los Angeles Province.

7 Napier and petitioner met in September 1971 and have maintained a business and social
8 relationship since then. They speak six or seven times per year, approximately three of which
9 are face-to-face meetings. These conversations usually relate to legal issues relative to estates,
10 wills or trusts. He has been very generous over the years in offering *pro bono* assistance with
11 minor legal issues related to problems arising in the various ministries of the Sisters of St.
12 Joseph.

13 Napier has known petitioner to be quite generous and conscientious in his service to his
14 local community. He served on the board of the Daniel Freeman Hospital as well as on the
15 Development Committee of the Sisters of St. Joseph of Carondelet. He took these
16 responsibilities seriously and added greatly to the efforts of each organization. In his service to
17 the Sisters of St. Joseph, he assumed the chairmanship of the Planned Giving Committee, giving
18 numerous hours to the success of his efforts.

19 Napier believes petitioner to be a man of high moral and ethical standards, a devoted
20 husband and father and a caring and honest friend. She believes that the misconduct that led to
21 the disciplinary proceedings is completely out of character and trusts that it will not be repeated.

22 **Judith Canaille**

23 Judith Canaille is a professional fiduciary in private practice in Glendale, California. She
24 has been a fiduciary since 1981.

25 Canaille and petitioner met in 1983 and maintained a business relationship since then
26 until the time of his suspension. He represented her and her partner in at least 75
27 conservatorship, decedent's estates and trusts. They spoke at least once weekly, primarily by
28 telephone although he was present for court appearances and other meetings.

1 Canaille always found petitioner to be completely conscientious. His insights were
2 extremely good. His research was thorough. His advice was practical and sound. His work
3 product was extremely well prepared. As a client, Canaille always felt that she could rely on his
4 advice and count on his support without reservation. She felt protected and extremely well
5 represented.

6 Petitioner told Canaille about the pending and prior disciplinary proceedings.

7 Canaille believes that petitioner is of the highest moral character and that his misconduct
8 s aberrational. She never experience anything other than total honesty, candor and
9 responsiveness in any of the matters in which he represented her. On a number of occasions, she
10 asked his legal advice on personal matters or for a second opinion. He always performed as
11 promised and in an extremely thoughtful and professional manner. She trusts him implicitly.

12 **Petitioner's Present Learning and Ability in the General Law**

13 Since April 2002, petitioner has been working for attorney Eric Yamamoto as a paralegal
14 for 16 - 20 hours a week. Yamamoto's practice primarily consists of estate planning and
15 probate. Petitioner's work includes legal research and preparation of estate planning documents,
16 pleadings and correspondence under Yamamoto's supervision.

17 In September 2004, petitioner was notified that he had successfully completed the
18 Multistate Professional Responsibility Examination.

19 Petitioner has participated in California-approved MCLE courses during his suspension
20 in a range of practice areas, including ethics, estate planning, diversity, stress reduction,
21 acquiring a closely-held business, client trust accounting, drafting settlement agreements,
22 attorney civility, internet legal research and profitability in a law office.

23 Petitioner continues to read the legal periodicals. He also discusses legal issues regularly
24 with his employer.

25 **DISCUSSION**

26 Standard 1.4(c)(ii) provides, in relevant part, that normally actual suspension imposed for
27 two years or more shall require proof satisfactory to the State Bar Court of the attorney's
28 rehabilitation, present fitness to practice and present learning and ability in the general law

1 before he or she will be relieved of the actual suspension.

2 In this proceeding, petitioner has the burden of proving by a preponderance of the
3 evidence that he has satisfied the conditions of standard 1.4(c)(ii). The court looks to the nature
4 of the underlying misconduct as well as the aggravating and mitigating circumstances
5 surrounding it to determine the point from which to measure petitioner's rehabilitation, present
6 learning and ability in the general law, and present fitness to practice before being relieved from
7 his actual suspension. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr.
8 571, 578.)

9 To establish rehabilitation, the Hearing Department must first consider the prior
10 misconduct from which petitioner seeks to show rehabilitation. The amount of evidence of
11 rehabilitation varies according to the seriousness of the misconduct at issue. Second, the court
12 must examine petitioner's actions since the imposition of his discipline to determine whether his
13 actions, in light of the prior misconduct, sufficiently demonstrate rehabilitation by a
14 preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p.
15 581.)

16 Petitioner must show strict compliance with the terms of probation in the underlying
17 disciplinary matter; exemplary conduct from the time of the imposition of the prior discipline;
18 and must demonstrate "that the conduct evidencing rehabilitation is such that the court may make
19 a determination that the conduct leading to the discipline ... is not likely to be repeated." (*In the*
20 *Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

21 Petitioner was found culpable of serious misconduct as was set forth above. He has
22 acknowledged the wrongfulness of his misconduct and has expressed remorse as well as his
23 resolve to avoid a reoccurrence. He has successfully obtained therapy to address the cause of the
24 emotional problems that led to his misconduct. It is unlikely that misconduct will reoccur.

25 The credible testimony of a long-time attorney friend, including his employer, is
26 persuasive in supporting the conclusion that petitioner has been rehabilitated and presently
27 possesses good moral character. Favorable character testimony from attorneys are entitled to
28 considerable weight. (Cf. *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Other witnesses,

1 including clients, a Catholic priest and sister, credibly attested to petitioner's good moral
2 character as well. The evidence of petitioner's good moral character was uncontroverted.

3 There is nothing in petitioner's background other than this incident which would suggest
4 that he is not fit to practice law. On the contrary, he has had no other disciplinary contact with
5 the State Bar in many years of practice prior to the commencement of the misconduct.

6 Moreover, petitioner has demonstrated his present learning and ability in the general law.

7 Therefore, the court finds that petitioner has demonstrated, by a preponderance of the
8 evidence, that he is rehabilitated and has present fitness to practice law.

9 **CONCLUSION**

10 Based on the foregoing, the court finds that petitioner ROBERT VICTOR MASENGA
11 has established by a preponderance of the evidence his rehabilitation, present fitness to practice
12 and present learning and ability in the general law.

13 Accordingly, the petition for relief from actual suspension from the practice of law
14 pursuant to standard 1.4(c)(ii) is GRANTED. It is further ordered that petitioner's actual
15 suspension from the practice of law in the State of California is hereby terminated and he shall
16 hereafter be entitled to resume the practice of law in this state upon the payment of all applicable
17 State Bar fees and previously assessed costs.

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19
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21 Dated: February 4, 2005

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23 _____
24 ROBERT M. TALCOTT
25 Judge of the State Bar Court
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CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 4, 2005, I deposited a true copy of the following document(s):

DECISION, filed February 4, 2005

in a sealed envelope for collection and mailing on that date as follows:

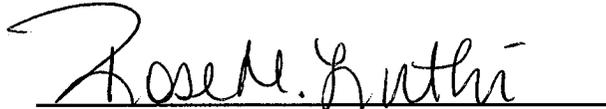
by overnight mail at Los Angeles, California, addressed as follows:

ERICA TABACHNICK, A/L
900 WILSHIRE BLVD #1000
LOS ANGELES CA 90017

by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BROOKE SCHAFER, ESQ., Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **February 4, 2005**.



Rose M. Luthi
Case Administrator
State Bar Court